

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

KIZALEE NOBLIT, NO. 3:13-cv-00628-HU

NO. 3:13-cv-00628-HU

Plaintiff,

FINDINGS AND RECOMMENDATION

V.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security,
Defendant.

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1 HUBEL, Magistrate Judge:

2 On April 11, 2013, Plaintiff Kizalee Noblit ("Plaintiff")
3 brought this action pursuant to 42 U.S.C. § 405(g) for judicial
4 review of the decision of the Commissioner of the Social Security
5 Administration ("SSA" or "Commissioner"), dated February 14, 2013,
6 finding Plaintiff ineligible for Supplemental Security Income
7 ("SSI") benefits under Title XVI of the Social Security Act, 42
8 U.S.C. §§ 1381-1383f. On appeal, Plaintiff asserts that she meets
9 or equals Listing 12.05C relating to intellectual disability, and
10 that the Administrative Law Judge ("ALJ") erred by failing to
11 consider this listing at step three of the sequential evaluation
12 process. She also asserts that the ALJ erred by improperly
13 disregarding third party testimony—namely, the testimony provided
14 by Plaintiff's partner, Charlyn Austin ("Austin").

15 In her response brief, filed on March 6, 2014, the
16 Commissioner concedes that this case should be remanded so the ALJ
17 can develop the record regarding Plaintiff's educational background
18 and determine if her impairments meet or equal Listing
19 12.05C—something the ALJ originally failed to do. Thus, the only
20 disputed issues before the Court are: (1) whether a remand for an
21 immediate payment of benefits is warranted based on Plaintiff's
22 evidence of equivalency to Listing 12.05C, and (2) whether the ALJ
23 erred in her treatment of Austin's testimony. For the reasons that
24 follow, the Commissioner's decision should be reversed and this
25 case should be remanded for further proceedings before the SSA.

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I. PROCEDURAL BACKGROUND

2 Plaintiff protectively filed an application for SSI on
3 November 4, 2009.¹ (Tr. 20, 40, 190, 243.) She initially alleged
4 disability beginning on March 18, 1980, her date of birth, but
5 later amended that date to February 10, 2009. (Tr. 41-42, 159;
6 Pl.'s Opening Br. at 1.) Plaintiff alleged disability due to
7 schizoaffective disorder, posttraumatic stress disorder ("PTSD"),
8 bipolar disorder, homicidal tendencies, antisocial personality
9 disorder, anger issues, a learning disability, arthritis, and nerve
10 damage. (Tr. 103.)

11 Plaintiff's application for SSI was denied initially on May
12 12, 2010, and upon reconsideration on September 24, 2010. (Tr. 20,
13 104-07, 113-14.) Having timely requested a hearing, Plaintiff then
14 appeared and testified before ALJ Catherine Lazuran on November 8,
15 2011, in Portland, Oregon. (Tr. 20, 31, 37, 113.) On February 24,
16 2012, the ALJ issued a written decision finding Plaintiff not
17 disabled and denying her claim for SSI benefits. (Tr. 31.)
18 Plaintiff then requested review of the ALJ's decision by the
19 Appeals Council, which was ultimately denied on February 14, 2013.
20 (Tr. 1-3.) As a result, the ALJ's decision became the final
21 decision of the Commissioner that is subject to judicial review.
22 (Tr. 1-2.) This appeal followed on April 11, 2013.

II. THE FIVE-STEP SEQUENTIAL EVALUATION PROCESS

24 || A. Legal Standard

A claimant is considered disabled if he or she is unable to engage in any substantial gainful activity by reason of any

¹ See footnote *infra* Part II.B.

1 medically determinable physical or mental impairment which . . .
2 has lasted or can be expected to last for a continuous period of
3 not less than 12 months[.]" 42 U.S.C. § 423(d)(1)(A). "Social
4 Security Regulations set out a five-step sequential process for
5 determining whether an applicant is disabled within the meaning of
6 the Social Security Act." *Keyser v. Comm'r Soc. Sec. Admin.*, 648
7 F.3d 721, 724 (9th Cir. 2011). Those five steps are as follows:

8 (1) Is the claimant presently working in a substantially
9 gainful activity? (2) Is the claimant's impairment
10 severe? (3) Does the impairment meet or equal [one of
11 the listed impairments]? (4) Is the claimant able to
perform any work that he or she has done in the past? and
12 (5) Are there significant numbers of jobs in the national
economy that the claimant can perform?

13 *Id.* at 724-25. The claimant bears the burden of proof for the
14 first four steps in the process. *Bustamante v Massanari*, 262 F.3d
15 949, 953-54 (9th Cir. 2001). If the claimant fails to meet the
16 burden at any of those four steps, then the claimant is not
disabled. *Id.*; *Bowen v. Yuckert*, 482 U.S. 137, 140-41 (1987).

17 The Commissioner bears the burden of proof at step five of the
18 process, where the Commissioner must show the claimant can perform
19 other work that exists in significant numbers in the national
20 economy, "taking into consideration the claimant's residual
21 functional capacity, age, education, and work experience." *Tackett*
22 *v. Apfel*, 180 F.3d 1094, 1100 (9th Cir. 1999). If the Commissioner
23 fails meet this burden, then the claimant is disabled, but if the
24 Commissioner proves the claimant is able to perform other work
25 which exists in the national economy, then the claimant is not
26 disabled. *Bustamante*, 262 F.3d at 954 (citations omitted).

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1 **B. The ALJ's Decision**

2 At the first step of the five-step sequential evaluation
 3 process, the ALJ found that Plaintiff had "not engaged in
 4 substantial gainful activity since November 4, 2009, the
 5 application date."² (Tr. 22.) At the second step, the ALJ found
 6 that Plaintiff had the following severe impairments:
 7 schizoaffective disorder, learning disorder, and history of
 8 alcoholism and drug abuse. (Tr. 22.)

9 At the third step, the ALJ found that Plaintiff's combination
 10 of impairments were not the equivalent of those on the Listing of
 11 Impairments.³ (Tr. 22.) The ALJ then assessed Plaintiff's
 12 residual functional capacity ("RFC") and found that she could
 13 "perform a full range of work at all exertional levels," subject to
 14 the following limitations: (1) Plaintiff "can only perform simple,
 15 routine tasks involving no interaction with the public and no more
 16 than occasional interaction socially at work," and (2) Plaintiff

19 ² It appears that the ALJ is actually referring to the
 20 protective filing date. (*Compare Tr. 20 and Tr. 190, with Tr. 159-*
 21 *64.*) The protective filing date is "the date a written statement,
 22 such as a letter, an SSA questionnaire or some other writing, is
 23 received at a social security office, at another Federal or State
 24 office designated by [the SSA], or by a person [the SSA] ha[s]
 25 authorized to receive applications for [it] as the filing date of
 an application for benefits." 20 C.F.R. § 416.340. "The SSA will
 use this date rather than the date of the official signed
 application for benefits 'if the use of that date will result in [a
 claimant's] eligibility for additional benefits.'" *Dashti v.*
Astrue, 508 F. App'x 347, 348 n.1 (5th Cir. 2013) (quoting 20
 C.F.R. § 416.340).

26 ³ The Listing of Impairments is found at 20 C.F.R. Part 404,
 27 Subpart P, Appendix 1, and described at 20 C.F.R. §§ 404.1525,
 404.1526, 416.925, 416.926.

1 "should avoid moderate exposure to hazards, such as unprotected
2 heights." (Tr. 23.)

3 At the fourth step, the ALJ noted that Plaintiff "has no past
4 relevant work." (Tr. 29.) In light of Plaintiff's age, education,
5 work experience, and RFC, at the fifth step, the ALJ found that
6 there were jobs existing in significant numbers in the national and
7 local economy that she could perform, including small products
8 assembly, laundry sorter, and conveyer line bakery worker. (Tr.
9 30.) Based on the finding that Plaintiff could perform jobs
10 existing in significant numbers in the national economy, the ALJ
11 concluded that Plaintiff had not been under a disability, as
12 defined under the Social Security Act, from the protective filing
13 date of November 4, 2009, through the date of the ALJ's decision,
14 February 24, 2012. (Tr. 31.)

15 **III. STANDARD OF REVIEW**

16 The court may set aside a denial of benefits only if the
17 Commissioner's findings are "'not supported by substantial evidence
18 or [are] based on legal error.'" *Bray v. Comm'r Soc. Sec. Admin.*,
19 554 F.3d 1219, 1222 (9th Cir. 2009) (quoting *Robbins v. Soc. Sec.*
20 *Admin.*, 466 F.3d 880, 882 (9th Cir. 2006)). Substantial evidence
21 is "'more than a mere scintilla but less than a preponderance; it
22 is such relevant evidence as a reasonable mind might accept as
23 adequate to support a conclusion.'" *Id.* (quoting *Andrews v.*
24 *Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995)).

25 The court "cannot affirm the Commissioner's decision 'simply
26 by isolating a specific quantum of supporting evidence.'" *Holohan*
27 *v. Massanari*, 246 F.3d 1195, 1201 (9th Cir. 2001) (quoting *Tackett*,
28 180 F.3d at 1097). Instead, the court must consider the entire

record, weighing both the evidence that supports the Commissioner's conclusions, and the evidence that detracts from those conclusions. *Id.* However, if the evidence as a whole can support more than one rational interpretation, the ALJ's decision must be upheld; the court may not substitute its judgment for the ALJ's. *Bray*, 554 F.3d at 1222 (citing *Massachi v. Astrue*, 486 F.3d 1149, 1152 (9th Cir. 2007)).

IV. DISCUSSION

A. Listing 12.05C: Intellectual Disability

Plaintiff first argues that she meets or equals Listing 12.05C relating to intellectual disability, and that the ALJ erred by failing to consider this listing at step three of the sequential evaluation process. Listing 12.05

explains that intellectual disability refers to significantly subaverage general intellectual functioning with deficits in adaptive functioning initially manifested during the developmental period; i.e., the evidence demonstrates or supports onset of the impairment before age 22. The listing further says that the level of severity for the intellectual disability impairment is met when any of four sets of additional requirements is satisfied. The third of those four sets requires a valid verbal, performance, or full scale IQ of 60 through 70 and a physical or other mental impairment imposing an additional and significant work-related limitation of function. Thus, Listing 12.05C has three main components: (1) subaverage intellectual functioning with deficits in adaptive functioning initially manifested before age 22; (2) an IQ score of 60 to 70; and (3) a physical or other mental impairment causing an additional and significant work-related limitation.

Kennedy v. Colvin, 738 F.3d 1172, 1175-76 (9th Cir. 2013) (internal citations, quotation marks, and brackets omitted).

As an initial matter, the parties do not appear to dispute that Plaintiff meets or equals the third element of Listing 12.05C. As the Commissioner concedes in her response brief, the ALJ

1 determined that Plaintiff "had the severe impairment of
2 schizoaffective disorder, which would impose an additional
3 significant work-related limitation of functioning." (Def.'s Resp.
4 Br. at 5.) Nothing more is required to satisfy the third element
5 of Listing 12.05C. See, e.g., *Stavrakis v. Colvin*, No.
6 6:12-cv-01929-SI, 2014 WL 1584494, at *6 (D. Or. Apr. 21, 2014)
7 ("If the ALJ finds that a claimant has another severe impairment at
8 step two of the sequential analysis, then the [third element of
9 Listing 12.05C] is satisfied.").

10 The first element requires Plaintiff "to demonstrate that
11 [s]he had 'significantly subaverage general intellectual
12 functioning with deficits in adaptive functioning initially
13 manifested during the developmental period.'" *Id.* at *5 (citations
14 omitted). Several judges in this district have "found 'that a
15 valid adult IQ score can be reflective of an impairment that
16 manifested during the claimant's developmental period.'" *Id.*
17 "Circumstantial evidence such as 'attendance in special education
18 classes, dropping out of high school prior to graduation,
19 difficulties in reading, writing or math, and low skilled work
20 history' can also support finding significantly subaverage general
21 intellectual functioning with deficits in adaptive functioning
22 beginning before age [twenty-two].'" *Id.*

23 Satisfying the second element, on the other hand, requires an
24 intelligence quotient ("IQ") score of 60 to 70. *Kennedy*, 738 F.3d
25 at 1176. In cases where, as here, "more than one IQ is customarily
26 derived from the test administered, e.g., where verbal,
27 performance, and full scale IQs are provided in the Wechsler
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1 series, . . . the lowest of these [is used] in conjunction with
 2 [Listing] 12.05." *Id.* at 1176 n.2 (citation omitted).

3 Plaintiff asserts in her opening brief that an intellectual
 4 evaluation performed by Dr. Patrick Ethel-King on April 19, 2010,
 5 combined with Plaintiff's self-reports to Dr. Ethel-King regarding
 6 her educational background, "are consistent with the first two
 7 requirements of [L]isting 12.05C." (Pl.'s Opening Br. at 8.)
 8 Plaintiff reported to Dr. Ethel-King that she attended special
 9 education classes prior to dropping out of high school. (Tr. 489.)
 10 She was also candid about the fact that she had been convicted of
 11 forgery and welfare fraud in 2009. (Tr. 489.) Dr. Ethel-King then
 12 administered the Wechsler Adult Intelligence Scale III ("WAIS-III")
 13 to Plaintiff, who received a verbal intelligence quotient ("IQ")
 14 score of 67, a performance IQ score of 80, and a full scale IQ
 15 score of 71. (Tr. 487, 491.) Dr. Ethel-King noted that
 16 Plaintiff's "performance was thought to be a reasonably valid
 17 representation of her current level of functioning" and diagnosed
 18 a learning disorder. (Tr. 491.)

19 In her written decision, the ALJ discounted Plaintiff's
 20 testimony, stating, among other things: " "Further bearing on the
 21 claimant's credibility is her criminal record, which includes a
 22 2009 conviction for welfare fraud and forgery, as well as a few
 23 theft III's."⁴ (Tr. 25.) The ALJ also rejected Dr. Ethel-King's
 24 diagnosis of a learning disorder because it was "not consistent

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 27 ⁴ Plaintiff does not challenge the ALJ's adverse credibility
 28 determination on appeal, and in fact concedes that her "general
 credibility has been damaged by past acts of dishonesty[.]" (Pl.'s
 Reply Br. at 2.)

1 with the evidence that claimant was in regular education in
2 school," when in actuality the portion of Dr. Ethel-King's opinion
3 cited by the ALJ clearly states that Plaintiff "reported an
4 academic history positive for receiving Special Education
5 services." (Tr. 28, 489.)

6 The Commissioner acknowledges that the latter finding was
7 "problematic," but nevertheless argues that a remand is appropriate
8 because Plaintiff's discredited testimony is the only record
9 evidence regarding her alleged participation in special education
10 classes. (Def.'s Resp. Br. at 5.) "[T]he ALJ's reasons for
11 discounting Dr. Ethel-King's diagnosis of [a] learning disorder are
12 problematic. If Ms. Noblit's testimony was credit[ed], it is
13 possible that ALJ could find she met Listing 12.05C. The
14 Commissioner opposes crediting Ms. Noblit's testimony, however,
15 because Ms. Noblit's testimony is unchallenged and, *decidedly*, not
16 credible. Therefore this matter should be remanded for the ALJ to
17 (1) develop the record regarding Ms. Noblit's educational
18 background, and (2) consider [for the first time] whether she met
19 or equaled Listing 12.05C.").

20 The Court agrees with the Commissioner that the present action
21 should be remanded for further proceedings before the SSA, not an
22 immediate payment of benefits. As in this case, the ALJ in
23 *Stavrakis* failed to address Listing 12.05C in his decision and the
24 plaintiff argued that he met the elements on appeal. 2014 WL
25 1584494, at *4. The record evidence indicated, *inter alia*, that
26 the plaintiff was born with neurological defects due to
27 complications during birth, received social security benefits from
28 age nine up until he was incarcerated in his early adult years, was

1 enrolled in special education throughout primary and secondary
2 school, unsuccessfully attempted to earn his general equivalency
3 degree, struggled with reading and writing for roughly twenty
4 years, received low scores on math and reading tests, and received
5 a verbal IQ score of 67, performance IQ score of 75 and a full
6 scale IQ score of 68 on the most recently administered WAIS-
7 III—which the psychologist felt was an accurate reflection of the
8 plaintiff's current functioning. *Id.* at *5-6. Judge Simon
9 nonetheless concluded that the record was not clear whether the
10 plaintiff met or equaled Listing 12.05C, noting that the ALJ was
11 "'in a better position than this court' to weigh the evidence and
12 make that determination." *Id.* at *4 (quoting *McAllister v. Sullivan*, 888 F.2d 599, 603 (9th Cir. 1989)).

14 The same observation holds true in the present case. The
15 record is not clear as to whether Plaintiff meets or equals Listing
16 12.05C, any more than it was in *Stavrakis*. Indeed, the record has
17 not been thoroughly developed and it is far from clear that the ALJ
18 would be required to find Plaintiff disabled if all the evidence
19 were properly evaluated. Accordingly, the Court recommends that
20 this case be remanded for further proceedings before the SSA. See
21 *Hill v. Astrue*, 698 F.3d 1153, 1162 (9th Cir. 2012) ("[T]he proper
22 course, except in rare circumstances, is to remand to the agency
23 for additional investigation or explanation. . . . Remand for
24 further proceedings is appropriate where there are outstanding
25 issues that must be resolved before a determination can be made,
26 and it is not clear from the record that the ALJ would be required
27 to find the claimant disabled if all the evidence were properly
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1 evaluated.") (emphasis added; citation and internal quotation marks
 2 omitted).

3 **B. Lay Witness Testimony**

4 Plaintiff also asserts that the ALJ erred by improperly
 5 disregarding testimony provided by her partner, Austin. In
 6 determining whether a claimant is disabled, an ALJ is required to
 7 consider lay witness testimony concerning a claimant's ability to
 8 work. *Bruce v. Astrue*, 557 F.3d 1113, 1115 (9th Cir. 2009). Such
 9 testimony is competent evidence which cannot be disregarded without
 10 providing specific reasons that are germane to each witness. *Stout*
 11 *v. Comm'r of Soc. Sec. Admin.*, 454 F.3d 1050, 1054 (9th Cir. 2006).
 12 "Inconsistency with medical evidence is one such reason." *Bayliss*
 13 *v. Barnhart*, 427 F.3d 1211, 1218 (9th Cir. 2005). Inconsistencies
 14 between the lay witness's testimony and the claimant's presentation
 15 to treating physicians or the claimant's activities of daily living
 16 is another. *Barber v. Astrue*, No. 1:10-cv-01432-AWI-SKO, 2012 WL
 17 458076, at *21 (E.D. Cal. Feb. 10, 2012).

18 Austin's testimony was provided by way of an adult function
 19 report prepared on November 20, 2009. (Tr. 213-20.) According to
 20 Austin, Plaintiff's daily activities include taking medications,
 21 watching television, playing video games, playing with Austin's
 22 children, and attending doctor's appointments when necessary. (Tr.
 23 213.) Austin testified that Plaintiff does not take care of anyone
 24 else and needs reminders regarding personal hygiene, taking
 25 medications, and caring for their cat.⁵ (Tr. 213-15.) She also

27 ⁵ The Court notes that a medical treatment note dated November
 28 13, 2009, states that Plaintiff "is able to function as a care
 giver." (Tr. 456.)

1 testified that Plaintiff experiences difficulties with house and
2 yard work, preparing meals, sleeping due to physical pain and
3 nightmares, going out in public, saving money, managing a checking
4 account, making appropriate purchasing decisions, concentration,
5 controlling her emotions, and a number of activities involving
6 physical exertion. (Tr. 214-18.)

7 The ALJ addressed Austin's adult function report at page
8 twenty-nine of her written decision, stating:

9 Consideration is given to the statement of Charlyn Danyel
10 Austin, the claimant's partner or spouse, who provided a
written statement dated November 20, 2009. While Ms.
11 Austin details significant limitations in her statement,
these observations are considered with great caution
because it appears Ms. Austin neither possesses the
12 expertise or the motivation to offer an objective or
functional assessment, and her opinion appears to be
13 colored by affection for the claimant. Still, these
observations have been taken into account in reaching the
14 above [RFC] finding because they demonstrate the claimant
has a greater functional capacity than she has alleged.
Ms. Austin, for example, described the claimant as
15 playing video games, cleaning the cat's litter box, doing
dishes, reading, and watching television.

16 (Tr. 29) (internal citation omitted).

17 Plaintiff contends that the ALJ failed to properly explain the
18 weight given to Austin's testimony, and to the extent the ALJ
19 rejected portions of Austin's testimony, she failed to provide
20 germane reasons for doing so. The Commissioner agrees that "a
21 generalized lack of expertise or motivation to offer an objective
22 or functional assessment is not a germane credibility
23 consideration." (Def.'s Resp. Br. at 9.) Yet, the Commissioner
24 maintains that any error is harmless because the ALJ provided two
25 "germane considerations"—the first being the ALJ's observation
26 that Austin's testimony appeared to be "colored by affection," and
27 the second being that "the ALJ found that many of Ms. Austin's
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1 identified limitation [we]re accounted for in the [RFC].” (Def.’s
 2 Resp. Br. at 9-10.)

3 The second “germane consideration” identified by the
 4 Commissioner—that the ALJ found the RFC accounted for “many” of
 5 the limitations identified by Austin—is nothing more than a
 6 misnomer, as “many” is not “all” and less than “all” means the ALJ
 7 is required to provide germane reasons for rejecting the excluded
 8 portion of the lay witness’s testimony. *Cf. Bayliss*, 427 F.3d at
 9 1218 (“The ALJ accepted the testimony of Bayliss’s family and
 10 friends that was consistent with the record of Bayliss’s activities
 11 and the objective evidence in the record; he rejected portions of
 12 their testimony that did not meet this standard. The ALJ’s
 13 rejection of certain testimony is supported by substantial evidence
 14 and was not error.”).

15 With respect to the first “germane consideration—the ALJ’s
 16 observation that Austin’s testimony appeared to be “colored by
 17 affection”—the Commissioner places significant weight on *Greger v.*
 18 *Barnhart*, 464 F.3d 968 (9th Cir. 2006). In that case, the Ninth
 19 Circuit upheld an ALJ’s rejection of a lay witness’s testimony,
 20 stating:

21 Likewise, the ALJ did not find Shields credible and
 22 so disregarded her affidavit which attested to Greger’s
 23 fatigue and shortness of breath following his surgery and
 24 to pain and numbness in his hands.

25 . . . The ALJ found that Shields’ ‘statements are
 26 inconsistent with [Greger’s] presentation to treating
 27 physicians during the period at issue, and with
 28 [Greger’s] failure to participate in cardiac
 rehabilitation.’ The ALJ also considered Shields’ ‘close
 relationship’ with [the claimant], and that she was
 possibly ‘influenced by her desire to help [him].’ The
 ALJ’s reasons for doubting Shields’ credibility are
 germane to her; accordingly, it was not error for the ALJ
 to disregard her testimony.

1 *Id.* at 972 (brackets in the original).

2 The Commissioner cited *Greger* for a similar proposition in
3 *Sylvester v. Astrue*, No. 03:11-CV-699-HZ, 2012 WL 2899244 (D. Or.
4 July 13, 2012), arguing that a "personal relationship" is
5 sufficient grounds to reject a lay witness's testimony. *Id.* at *4.
6 Judge Hernandez determined that *Greger* was distinguishable insofar
7 as the ALJ (1) used the "personal relationship" as the primary
8 reason for considering the lay witness's testimony with caution,
9 and (2) failed to discuss the nature of the relationship between
10 the claimant and the lay witness or point to any facts supporting
11 the notion that the lay witness was in any way influenced by a
12 desire to aid the claimant. *Id.* Ultimately, Judge Hernandez
13 directed the ALJ to clarify her findings on remand because it was
14 not clear whether she actually accepted or rejected the lay
15 witness's testimony. *Id.*

16 Similarly, in this case, it is not entirely clear whether the
17 ALJ intended to accept or reject any or all of Austin's testimony.
18 Assuming the ALJ in fact rejected portions of Austin's testimony,
19 *Greger* is distinguishable from the circumstances in this case for
20 the same reasons Judge Hernandez distinguished it in *Sylvester*.
21 There may very well be germane reasons why any or all of Austin's
22 testimony should be rejected, but the fact that testimony from a
23 family member or loved one "appears to be colored by affection for
24 the [social security] claimant," standing alone and without further
25 explanation, is not one of them.

26 In short, in course of evaluating whether Plaintiff meets or
27 equals Listing 12.05C, a matter the Commissioner has already
28 conceded warrants remand for further proceedings before the ALJ,

1 the Court recommends directing the ALJ to clarify her findings with
2 respect to Austin's testimony. (See also Def.'s Resp. Br. at 12)
3 ("Moreover, if the Court finds an error in assessing Ms. Austin's
4 opinion, this error can be addressed on remand.").

5 **V. CONCLUSION**

6 For the reasons stated, the Commissioner's decision should be
7 reversed and this case should be remanded for further proceedings
8 before the SSA.

9 **VI. SCHEDULING ORDER**

10 The Findings and Recommendation will be referred to a district
11 judge. Objections, if any, are due **July 25, 2014**. If no
12 objections are filed, then the Findings and Recommendation will go
13 under advisement on that date. If objections are filed, then a
14 response is due **August 11, 2014**. When the response is due or
15 filed, whichever date is earlier, the Findings and Recommendation
16 will go under advisement.

17 Dated this 7th day of July, 2014.

18 /s/ Dennis J. Hubel

19 _____
20 DENNIS J. HUBEL
21 United States Magistrate Judge
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